

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN STOKES, et al. &	:	CIVIL ACTION
JAMES JENKINS	:	15-CV-1520 &
	:	15-CV-3894
Plaintiffs	:	
vs.	:	Philadelphia, Pennsylvania
	:	August 2, 2017
REALPAGE, INC.	:	
	:	
Defendant	:	MOTIONS HEARING

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BEFORE THE HONORABLE JOHN R. PADOVA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (At 11:00 a.m. in Courtroom 17B.)

2 DEPUTY CLERK: All rise.

3 Court is now in session, the Honorable John R. Padova
4 presiding.

5 THE COURT: Good morning, all --

6 ALL PRESENT: Good morning, your Honor.

7 THE COURT: -- and welcome to our visitors, who are
8 here *pro hac vice*, thank you and you may be seated.

9 Well, we have on the calendar this morning, a hearing
10 on a motion for the preliminary approval of the class action
11 settlement involving the case of Stokes versus Realpage, Civil
12 Action No. 15-1520 and Jenkins versus Realpage, Civil Action No.
13 15-3894.

14 Who is going to present on behalf of the moving party?

15 MR. FRANCIS: Jim Francis, your Honor.

16 THE COURT: Mr. Francis, you may proceed.

17 MR. FRANCIS: Thank you. May I approach, your Honor?

18 THE COURT: Yes, please do.

19 May it please the Court, Jim Francis for the Stokes
20 and Jenkins, plaintiffs.

21 Your Honor, I would also like to introduce my co-
22 counsel David Searles from my firm.

23 MR. SEARLES: Good morning, your Honor.

24 THE COURT: Mr. Searles, good morning.

25 MR. FRANCIS: As well as, Sharon Dietrich from

1 Community Legal Services.

2 MS. DIETRICH: Good morning, your Honor.

3 THE COURT: Welcome, Counsel.

4 MS. DIETRICH: Thank you.

5 MR. FRANCIS: And in the back are also other CLS
6 fellows or Michael Hollander, actually, is a lawyer -- a CLS as
7 well --

8 THE COURT: Very good.

9 MR. FRANCIS: -- and so, we're happy to have them here
10 as well.

11 THE COURT: To our intern, CLS means Community Legal
12 Services.

13 MR. FRANCIS: Your Honor, that's a very good intro,
14 where I'd like to start --

15 THE COURT: Okay.

16 MR. FRANCIS: -- if it would be okay with the Court --

17 THE COURT: Yes, sir.

18 MR. FRANCIS: -- I'd just like to provide some content
19 and a backdrop for the settlement that we are seeking approval
20 of, my goal is to outline the context of where the settlement
21 came from that might not be apparent from the -- the docket or
22 the motion.

23 Your Honor, this was a case that came to my firm by
24 way of CLS. The Court is, undoubtedly aware of CLS's role in
25 the community on behalf of low-income Philadelphians,

1 specifically, tenants, employees, job applicants and the work
2 that CLS does is enormously important for the community.

3 I have had the fortune and the benefit and, frankly,
4 the honor of having CLS come to me from time to time to
5 prosecute a Fair Credit Reporting class action and they have
6 come to me in the past and this is a case they've approached me
7 on as well.

8 And CLS -- and specifically, Ms. Dietrich -- if the
9 Court has questions, she can provide additional context, but was
10 seeing a problem whereby consumers, tenants and job applicants,
11 who had had a minor offense that had been expunged, were finding
12 out that when they went to apply for an apartment or apply for a
13 job, that the background screening company was still reporting
14 that expunged offense.

15 And why is that happening? And we were able to figure
16 out, that at least, in some circumstances, the reason was, the
17 defendant background check agency was not processing records
18 that were coming from the Administrative Office of the
19 Pennsylvania Courts.

20 And within the last, I don't know ten -- I think, ten
21 years -- Ms. Dietrich might correct me -- the Pennsylvania
22 Administrative Office of the Pennsylvania Courts began supplying
23 consumer-reporting agencies with something called, a life-cycle
24 file.

25 So, if I can just provide a little more backdrop. So,

1 the background-checking agencies, like, Realpage, the defendant
2 in this case, they'd get court records often or sometimes, those
3 court records are updated, they might be expunged, they might
4 subsequently be sealed, they might be dismissed.

5 And what sometimes happens is, the court record
6 reports on the original record without reporting the fact that
7 the -- excuse me -- that the -- the record had been expunged or
8 changed. Ms. Dietrich --

9 THE COURT: Okay.

10 So, this result in the typical case, it results within
11 the context of a -- a proposed creditor making application to a
12 company like, Realpage for background information under the
13 Federal Credit Reporting Act as required by the Federal Credit
14 Reporting Act with respect to a person, who was interested in
15 borrowing money from that creditor, that's -- that's backdrop
16 for this issue.

17 MR. FRANCIS: That is the backdrop, your Honor, except
18 it not only affects the creditor/lender relationship, it also
19 occurs in the context of a tenant applying for an apartment --

20 THE COURT: Okay.

21 MR. FRANCIS: -- or job applicant applying for a
22 job --

23 THE COURT: Okay.

24 MR. FRANCIS: The FCRA applies in all of those
25 contexts.

1 THE COURT: Okay.

2 MR. FRANCIS: This case is not about the
3 lender/creditor context --

4 THE COURT: About --

5 MR. FRANCIS: -- it's about the -- the context of Ms.
6 Stokes, who was applying for an apartment and Realpage supplies
7 decisions for landlords to make decisions.

8 So, CLS came to us with -- with this issue, that they
9 had seen before and -- and in full candor to the Court, we have
10 seen this issue previously in connection with other companies,
11 like Realpage and frankly, other litigation that CLS has brought
12 to us.

13 So, that was the backdrop for what was happening.

14 Additionally, we saw that when Ms. Stokes, who was the
15 subject of one of these reports, that -- that included an
16 expunged defense for her, that cleared by the court, we saw that
17 there was another claim and that claim is that, the -- when she
18 passed her a copy of her file from Realpage, they did not
19 disclose the source of that record, instead they just disclosed
20 the this came from the court, when in fact, we had knowledge
21 and/or evidence that Realpage was getting its court records from
22 an intermediary or a vendor.

23 My firm obtained a decision, it was from Judge
24 Buckwalter from this court, your Honor's colleague, about four
25 years ago in a case called, Dennis versus Transunion in which

1 Judge Buckwalter in the district -- the Eastern District of
2 Pennsylvania held in that case that:

3 The failure of the consumer reporting agency to
4 disclose the intermediary or the vendor that they used
5 to disclose public records, it is a violation of Section
6 1681(g) of the Fair Credit Reporting Act.

7 I know this is a lot of backdrop, but I think it will
8 help explain where the --

9 THE COURT: Is that a settled issue in the Third
10 Circuit?

11 MR. FRANCIS: Well, it's not a settled issue in the
12 Third Circuit, your Honor, because that case is still ongoing
13 and I would -- I will admit to the Court, that there is
14 vociferous debate over whether Judge Buckwalter's interpretation
15 and our view of the law, is the right one.

16 THE COURT: How about our other circuits?

17 MR. FRANCIS: Nothing has held, specifically, that
18 clearly on that issue. So, it has not been --

19 THE COURT: So, we have a significant and serious
20 challenge to the underlying principle of the law upon which the
21 plaintiffs' case is based?

22 MR. FRANCIS: That's correct, your Honor.

23 So, that was the base -- so, we brought this case and
24 we had a Rule 16 conference in front of the Court early on that
25 I recall based upon two class claims, Section 1681(e)(b), which

1 that's the provision of the Fair Credit Reporting Act that I'll
2 refer to as the accuracy provision. That provision requires
3 that when a background screening agency or a credit reporting
4 agency reports information about a consumer, they have to report
5 it subject to the -- the following standard, reasonable
6 procedures to assure maximum possible accuracy.

7 It's our -- it was our claim and allegation that
8 Realpage's failure to note that the -- Ms. Stokes' offense had
9 been expunged and instead, reporting out the original, outdated
10 version of that, it was a failure to use reasonable procedures
11 to assure maximum possible accuracy.

12 The second class claim was what I alluded to as to the
13 Dennis versus Transunion case, which was that when Ms. Stokes
14 asked for a copy of her file, Realpage did not disclose the
15 actual source, which was a company called, Genuine Data
16 Services.

17 Section 1681(g) (a) of the Fair Credit Reporting Act
18 requires that when a consumer asks for a copy of their credit
19 report or their background check, the CRA has to provide all
20 information in the file -- all information -- as well as the
21 sources of the information. So, this is that source claim
22 issue, that I -- I outlined earlier.

23 That was the case, we did not know this, but I will
24 call them, friendly competitors or colleagues from -- from
25 Virginia had filed a similar case in Jenkins. And they did not

1 have the EB claim, the expungement claim, they had only two
2 different (g) claims.

3 They had had some -- which I was not part of -- they
4 had had some -- an early mediation effort with Realpage and
5 then, in July of 2015, all of us had a mediation before JAMS --
6 Judge Welsh -- JAMS, a former Magistrate Judge of this Court,
7 again, in July of 2017, that did not resolve the case, we made
8 some progress, it did not resolve the case.

9 After that, we exchanged discovery and as the Court is
10 aware -- and your Honor may recall -- at some point in the
11 middle of discovery of this case, the Supreme Court came down a
12 decision called, Spokeo, which we've all probably heard a lot
13 about. And the defendant moved for a stay and this Court
14 granted a stay of this litigation until the United States
15 Supreme Court had, actually, issued its Spokeo decision and it
16 stayed the case, based upon the Supreme Court's granting of the
17 *certiorari* petition from Spokeo.

18 Thereafter, the Supreme Court came down with Spokeo, I
19 don't think it's a surprise to the Court that we had two very
20 different views of the impact. In our view and I think it's
21 been confirmed by the Third Circuit in -- In Re: Horizon and
22 subsequently -- it is our view, Spokeo did not change the law at
23 all, it clarified the Supreme Court's precedent regarding
24 standing -- Article III standing.

25 Not surprisingly, as well the defendant took a

1 different view and, therefore, it moved to dismiss plaintiffs'
2 Section 1681(g) claims on the basis that, in light of Spokeo,
3 the claims -- the plaintiff did not have standing and the claims
4 should be dismissed under 12(b)(1) and summary judgment.

5 Briefing was -- briefing occurred -- and this Court
6 denied that motion. Thereafter and only thereafter, did the
7 parties resume settlement discussions, resumed discovery and
8 were finally, after many, many months and many discussions, able
9 to hammer out the settlement that is before your Honor for your
10 Honor's approval and review.

11 So, the reason I'd bring all of that up, is the record
12 should be clear -- and I hope it's clear -- but I'm happy to
13 address any questions the Court has, obviously, that this was
14 not a case where there was any collusion, there was -- this was
15 not the filing of a complaint, where thirty days later the
16 settlement occurred. This was arm's length, all of the way,
17 motions to dismiss, discovery, unsuccessful mediation.

18 And I think, your Honor might know of this, Judge
19 Welsh is one of the best FCRA mediators in the country --

20 THE COURT: Yes.

21 MR. FRANCIS: -- and she was not able to get this case
22 resolved.

23 So, there was clear arm's length negotiation here, I
24 would argue that there is -- there is no obvious deficiencies in
25 the settlement that's been proposed. And the settlement readily

1 meets the standard for preliminary approval.

2 But I'd like to also tell you -- tell your Honor --
3 why I think, even if this were a final approval hearing, this is
4 what I intend to argue at a later date, I think this is a very,
5 very good settlement and I'll tell you why.

6 First, the settlement provides for injunctive relief
7 for three separate classes. The question of whether or not, the
8 FCRA permits injunctive relief is not settled in this circuit.
9 I must disclose to the Court that to my disappointment, the
10 majority of the cases have found that the FCRA does not provide
11 injunctive relief, that that -- that the only entity that can
12 provide -- that can obtain injunctive relief is the FTC or the
13 CFPB, that private litigants cannot obtain it. So, the
14 relevance of that is that, in this settlement, we've been able
15 to obtain what the law, likely, would not have allowed us to
16 obtain.

17 In addition, there are three classes before the --
18 before the Court. One, the -- I'll call it, the expungement
19 class, we've learned through discovery that there are a hundred
20 and thirty people, who are -- within the expungement class.
21 Each of those people gets a guaranteed payment of eleven hundred
22 dollars.

23 The FCRA provides a maximum statutory damage of a
24 thousand dollars, so we've exceeded what the FCRA permits for
25 statutory damages and we would consider that to be a very, very

1 good result.

2 And if the Court would like us to do it now or in
3 connection with subsequent briefing or if you'd want us to
4 address it at a later date, we would be happy to provide the
5 Court with a canvassing of the law of these settlements. And I
6 can assert to the Court, eleven hundred dollars is a very good
7 result for this type of a claim. Next --

8 THE COURT: And that's if --

9 MR. FRANCIS: Sure.

10 THE COURT: -- there is going to be enough money to
11 go around, which is one of the problems I have and I do want you
12 to continue making your presentation, but we're going to come
13 back to that problem and really focus on it.

14 MR. FRANCIS: Okay, your Honor --

15 THE COURT: Okay.

16 MR. FRANCIS: -- understood.

17 As for the -- the source class --

18 THE COURT: I mean, if every -- if we have the right
19 number with respect to the members in the expungement class and
20 every member of that class got eleven hundred dollars, that
21 would be a hundred dollars more than they were entitled to under
22 the statute, is that correct?

23 MR. FRANCIS: It is, your Honor, but they're also
24 giving up a -- actual damages.

25 THE COURT: Yes, okay, okay.

1 MR. FRANCIS: So --

2 THE COURT: Well --

3 MR. FRANCIS: Yes.

4 THE COURT: -- how did you determine, the number of
5 members in the expungement class?

6 MR. FRANCIS: The defendant's records, the -- were
7 able to identify that, specifically, by reference to that life-
8 cycle file, that I mentioned.

9 Pennsylvania has this -- it's unlike, other courts and
10 other states, I have not seen something like this -- Ms.
11 Dietrich might know better than I do -- but I have not seen
12 another court or a court system or a state court, that provides
13 the type of life-cycle subsequent file, that the AOPC does. And
14 as a result, they are able to see whether they have a life-cycle
15 file for these people and what --

16 THE COURT: So that you've found in the ex -- so, that
17 the expungement class, which you say, numbers a hundred and
18 thirty members, it's a hundred and thirty members, who had been
19 subjected to a life-cycle file review that wasn't disclosed?

20 MR. FRANCIS: Correct.

21 Well, it -- it had -- they had been subject to a -- an
22 offense at some point, they had an offense on their record.

23 THE COURT: Right.

24 MR. FRANCIS: They had a subsequent expungement of
25 that offense.

1 THE COURT: Right.

2 MR. FRANCIS: The next step was, AOPC notified the
3 defendant of the expungement --

4 THE COURT: Right.

5 MR. FRANCIS: -- the defendant failed to look at that
6 or download that file or -- you know -- the technical, you know,
7 failure there, it's hard for me to understand, but what we do
8 know is, they did not incorporate that data in their records, so
9 that when they reported it out, they reported out the offense as
10 if it had not been expunged.

11 THE COURT: Okay.

12 MR. FRANCIS: So, in other words, the life-cycle file,
13 it's just an update.

14 THE COURT: Right.

15 MR. FRANCIS: So, because they had updates, the --

16 THE COURT: What period of time, are we talking about?

17 MR. FRANCIS: Ah, we were talking about a period of
18 time, between two years prior to the filing of the action, which
19 was in early of 2015 and then, up through the point of -- I want
20 to say, it was up through the point of July of 2015.

21 THE COURT: Okay.

22 MR. FRANCIS: Because the defendant in connection with
23 the settlement in this case, recognized that it had that error
24 and corrected its records after this lawsuit was filed and
25 settlement discussions had begun.

1 THE COURT: Okay.

2 Now, let me just touch on the class definition with
3 respect to expungement.

4 MR. FRANCIS: Yes, your Honor.

5 THE COURT: And what that definition means with
6 respect to what people are encompassed in that class, speak to
7 that for me, if you will.

8 MR. FRANCIS: Yes, your Honor.

9 So, the -- the settlement class for expungement is all
10 persons residing in the United States of America, including its
11 territories and Puerto Rico about whom from March 3rd, 2013
12 through the date when the Court enters its preliminary approval
13 order, that the defendant prepared a consumer report which
14 included information regarding one or more criminal cases, which
15 at the time the report was prepared by the defendant, had been
16 expunged or sealed and life-cycle identified the record as
17 having been expunged or sealed prior to the date of the report.

18 THE COURT: How about if there were individuals, who
19 had been convicted of crimes that were expunged, but that
20 information came from sources other than life-cycle files, are
21 they included in the class?

22 MR. FRANCIS: They are not included in the -- in the
23 class.

24 THE COURT: Okay.

25 So, that the hundred and thirty members are the only

1 people in that period of time, that you've discovered from
2 Realpage's records, that were -- that the information came
3 through life-cycle files?

4 MR. FRANCIS: Correct, your Honor, because other
5 states and other courts don't have a file like that --

6 THE COURT: Okay.

7 MR. FRANCIS: -- so, it's -- there is no way for us or
8 -- I don't want to say, there's no way -- but it -- we did not
9 learn of any way to learn if anybody else, other than these --
10 these one thirty and these one thirty were all subject to the
11 exact same violation, according to our theory of liability,
12 which was --

13 THE COURT: Well, these were the only members that
14 were subjected to the exact same process and that's a process
15 which included life-cycle files?

16 MR. FRANCIS: That's correct, your Honor --

17 THE COURT: All right, okay.

18 MR. FRANCIS: -- that's correct.

19 THE COURT: So, that any other expungement problems
20 which -- which do not involve life-cycle files, were not
21 included in this place?

22 MR. FRANCIS: That's correct, your Honor.

23 THE COURT: Okay.

24 MR. FRANCIS: Moving towards the source settlement
25 class, I outlined before what the theory of liability there was

1 and your Honor correctly noted that this is not settled law of
2 the land, I think, we're right on this, I think, they have to
3 disclose the source of -- if it's a vendor or it's an
4 intermediary and as I indicated earlier, they are now doing that
5 as a result -- if the settlement is approved by your Honor --
6 they will now disclose that to consumers. And that's -- for us,
7 that's correct view of the law, but again, it's not -- it's far
8 from settled.

9 So, for each member of the source class, in addition
10 to the injunctive relief, they will each get two hundred
11 dollars, which for a failure to disclose an item of information
12 like that, that is a very, very good number for that type of
13 violation. And again, if we were to canvass the settlements,
14 which I am happy to do, I can assure your Honor that that is a
15 very good result for the failures to disclose that claim.

16 One of the things I did not mention earlier, that I
17 think is relevant or should be relevant to this Court's
18 analysis, we could only win this case by proving that the
19 defendant willfully violated the FCRA.

20 THE COURT: Yes.

21 MR. FRANCIS: There is no statutory damages, there are
22 no punitive damages, if we could not prove they willfully
23 violated. While Mr. Raether and I, who re -- Mr. Raether, who
24 represents Realpage and I -- have for years vigorously disagreed
25 with what willfulness means under the statute and your Honor has

1 touched upon this in the past with some of your other FCRA
2 decisions, willfulness is not negligence, it's a higher
3 standard.

4 And if we did not -- were not able to prove that they
5 willfully violated the FCRA, we lose. So, to be -- and a
6 willful violation of the FCRA entitles a consumer to between a
7 hundred and a thousand dollars.

8 So, here we're getting the source class, a guaranteed
9 payment of two hundred dollars, which is within the range of
10 statutory damages for a willful violation in the context of a
11 claim that the defendant does not believe is settled and they
12 don't think our view of the law is right.

13 Moving on, there is another class, the chart class --

14 THE COURT: Well, before we leave the source class --

15 MR. FRANCIS: Yes, your Honor.

16 THE COURT: -- as I understand it, there are 4681
17 people --

18 MR. FRANCIS: Yes, your Honor.

19 THE COURT: -- in that class, how did you determine
20 that number?

21 MR. FRANCIS: Yes, your Honor.

22 Each one of those people, was somebody who wrote or
23 contacted the defendant and asked for a copy of their file. The
24 defendant maintains records of everybody to whom it sends a
25 correspondence or a copy of their file, whether the request is

1 made by telephone, e-mail or whether it's made by mail, so it
2 came from their records.

3 THE COURT: Okay. Now, the chart class.

4 MR. FRANCIS: Yes, your Honor.

5 As I think was clear from my -- my outline earlier,
6 the main --

7 THE COURT: Well, before we leave source --

8 MR. FRANCIS: Yes, your Honor.

9 THE COURT: -- these individuals may have suffered
10 actual damage.

11 MR. FRANCIS: Which individuals, your Honor?

12 THE COURT: The source class members --

13 MR. FRANCIS: Yes.

14 So, they --

15 THE COURT: -- of more than two hundred dollars?

16 MR. FRANCIS: So, that's a good question.

17 One of the things that I was going to address but I'll
18 address it now, is one of the other things about the settlement
19 that we're very proud of that, is the release is tailored and
20 narrowly limited.

21 So, if somebody in the -- your Honor is correct as to
22 the (g) (a) (2) claim --

23 THE COURT: Right.

24 MR. FRANCIS: -- if somebody has actual damage, I am
25 really upset because you didn't disclose the source or I

1 suffered immense financial harm, because I didn't get that
2 information.

3 THE COURT: Right.

4 MR. FRANCIS: You're correct, that claim would be
5 released and that's within the two hundred dollars and -- but
6 all of the other FCRA claims that they might have, if -- the
7 inaccuracy claim published, maybe, something was published
8 inaccurately about them, maybe, they disputed something, they're
9 all preserved. They could bring FCRA claims against this
10 defendant. So, it's only actual damages relating to the failure
11 to -- for the defendant to identify the source.

12 THE COURT: Well, let's take a typical tenant, who
13 wants to enter into a lease with a landlord and loses the
14 opportunity to enter that lease, because of inaccurate
15 information --

16 MR. FRANCIS: Yes.

17 THE COURT: -- that's been through the system and it
18 took that tenant another six months to find a likely place and
19 by that time, the rental went up significantly.

20 MR. FRANCIS: Yes.

21 THE COURT: What happens to that actual damage claim?

22 MR. FRANCIS: That tenant can still bring a claim for
23 the misreporting of the inaccurate information in the first
24 instance, that --

25 THE COURT: And --

1 MR. FRANCIS: -- tenant cannot bring a claim, because
2 the information or the source wasn't disclosed to them. So, in
3 other words, the -- the bulk of the individual FCRA claims that
4 generates sizable compensatory damage classes, are the
5 inaccuracy claims.

6 THE COURT: They continue to live?

7 MR. FRANCIS: Right.

8 The accuracy claims and the --

9 THE COURT: The accurately claims --

10 MR. FRANCIS: -- and the investigation claims --

11 THE COURT: Yes.

12 MR. FRANCIS: -- somebody writes and disputes a
13 million times and the credit-reporting agency doesn't respond,
14 all of those claims are preserved and we are very -- that we
15 specifically, negotiated that release, so that they would not be
16 impacted, that tenant can still bring a claim against this
17 company for the misreporting of the inaccurate information.

18 THE COURT: Okay. Chart class.

19 MR. FRANCIS: Okay.

20 Chart class, so as I think I tried to outline before,
21 the chart class was really a -- an ancillary and a -- a pendent
22 claim brought in the Jenkins litigation, but the main claims
23 were as I outlined, the expungement and the -- the source-class
24 claims.

25 There was a period of time for certain consumers that

1 when they asked Realpage --

2 THE COURT: It's -- this is an injunction-only relief?

3 MR. FRANCIS: Yes, your Honor.

4 THE COURT: Yes, okay.

5 MR. FRANCIS: It's an injunction-only, your Honor, but
6 the release is only for that injunction-only claim. In other
7 words, if they have an inaccuracy, they can bring a claim, if
8 they have even a different source claim, they can bring a claim.
9 So, I want to make that -- make sure that that's clear.

10 What happened was, there was a period of time, when
11 certain consumers would ask for their file online, an e-mail
12 version and the defendant would e-mail it to them.

13 And one of the things that Section 1681(g)(c) of the
14 Fair Credit Reporting Act requires is that in addition to the
15 information I outlined, the -- all of the information in the
16 file, the source, the CRA also has to provide the FTC statement
17 of rights.

18 For whatever reason, when consumers would get their
19 file online from Realpage, there was a period of time, where the
20 FTC statement of rights, it wasn't formatted right and it
21 wouldn't have the numbers and it wouldn't -- it was -- it was
22 jumbled and it was garbled, no other claims, just that -- that
23 happened. So, that was a -- the defendant have a very strong
24 argument, that was a technical error, good luck in proving
25 willfulness for that claim.

1 So, what we decided to do was -- which I think was the
2 right thing to do, I still do -- was give injunctive relief for
3 those people as well as anybody going forward, if they need
4 their FTC statement of rights, they can get it. Do not release
5 any of their good accuracy claims. And the only thing that the
6 chart class releases is a claim arising from any damage that the
7 information on that form was garbled, that's -- that's the chart
8 class.

9 THE COURT: What's the injunctive relief for the chart
10 class?

11 MR. FRANCIS: So, the injunctive relief is that they
12 can get a copy, they can go online and go to the website in this
13 case.

14 THE COURT: Well, what about those people, that don't
15 have access to -- to websites or online --

16 MR. FRANCIS: Ah, those people --

17 THE COURT: -- what do they do?

18 MR. FRANCIS: -- will be able to ob -- they'll be
19 getting notice and if -- they will be given a number by which
20 they can get that information through a telephone number.

21 THE COURT: And how long will the list be available on
22 the Internet?

23 MR. FRANCIS: Well, the -- the list on the Internet --
24 that's a good question, I don't have the answer for that, but I
25 can find that out.

1 It will be available -- I don't know, I feel --

2 THE COURT: I thought I saw, six months.

3 MR. FRANCIS: -- six months, okay.

4 (Discussion held off the record at 11:27 a.m.)

5 MR. FRANCIS: I think the -- that sounds right, your
6 Honor.

7 MR. SEARLES: Yeah, it's a hundred and eighty days
8 from the effective date, your Honor.

9 THE COURT: Six month?

10 MR. SEARLES: That's correct.

11 MR. FRANCIS: A hundred and eighty days -- yeah, from
12 the effective date, that's correct, I do recall that now.

13 But I think, importantly, the defendant has changed
14 its -- the glitch, so even if they were to go Realpage in ten
15 years or five years or three years, the defendant is going to
16 disclose their rights to them. So, this is -- that would only
17 be for the -- the past --

18 THE COURT: Well, the six-month list is -- I mean,
19 we're talking about a list on a website.

20 MR. FRANCIS: Correct.

21 THE COURT: And the six months means that the list has
22 to remain on the website for six months.

23 MR. FRANCIS: Yes, your Honor.

24 THE COURT: Right.

25 But the other way -- the other way, that the public

1 could get that information, would be to call or write directly?

2 MR. FRANCIS: Correct.

3 And not only that, your Honor, if for example, they
4 didn't want to go to the website for their settlement --

5 THE COURT: Right.

6 MR. FRANCIS: -- instead, they'd just ask Realpage
7 when they'd get notice, what -- what is this, Realpage, what
8 happened? If they'd just ask for their file disclosure that
9 they're entitled to under the FCRA, they're going to get it
10 there as well, because the defendant has corrected its
11 procedures.

12 THE COURT: Okay.

13 MR. FRANCIS: So, those are the -- that's -- that's an
14 overview of the -- of the three classes and the recovery that's
15 available for those three classes.

16 And a history, hoping to demonstrate to the Court,
17 that the -- the settlement was arm's length. There are several
18 other provisions that the Court, obviously, will look at and
19 want to review and obviously, there is a request for attorneys
20 fees, that we haven't decided yet, but it allows --

21 THE COURT: Let's talk about the money.

22 MR. FRANCIS: Yes, your Honor.

23 THE COURT: And the money that the defendant is
24 putting up, as I totaled it, is a \$1,079,200.00.

25 MR. FRANCIS: Yes, your Honor.

1 THE COURT: Okay.

2 And that amount was arrived at by taking the number of
3 members in the expungement class, which was a hundred and thirty
4 members and taking the agreed-upon maximum amount of coverage
5 per member of eleven hundred dollars, that's about \$143,000.00.

6 MR. FRANCIS: Yes, your Honor.

7 THE COURT: Then, with respect to the source, there
8 are 4681 members of the punitive class, that could recover up to
9 two hundred dollars and that came to \$936,200.00.

10 So then, if every member of each class showed up and
11 collected, the agreed-upon maximum amount, there wouldn't be
12 enough money there to pay it, because out of that same amount,
13 we would have counsel fees, where counsel has agreed to a
14 maximum of one-third and that would be one-third of
15 \$1,079,200.00. Plus -- as I understand it -- there would be
16 legal costs reimbursed and then, administrative costs and then,
17 taxes.

18 What can you tell me about the sufficiency of the
19 amount of money that this settlement produces with respect to
20 payment to those people, who actually were involved -- the
21 citizens?

22 MR. FRANCIS: Yes, two -- two things, your Honor.

23 THE COURT: Right.

24 MR. FRANCIS: First, the reason that --

25 THE COURT: First of all --

1 MR. FRANCIS: Yes.

2 THE COURT: -- am I right in my approach to the money
3 on this?

4 MR. FRANCIS: You are right --

5 THE COURT: Okay.

6 MR. FRANCIS: -- you are right --

7 THE COURT: All right.

8 MR. FRANCIS: -- that what we did was, which we'd -- I
9 -- we believed was it appropriate and I do believe it was
10 appropriate -- was before we even looked at legal fees, we
11 negotiated each class individually, right, what they should get
12 and we went back and forth, back and forth --

13 THE COURT: Right.

14 MR. FRANCIS: -- over two years, right.

15 And then, from that recovery -- and your Honor is
16 correct -- that attorneys fees will come out of that as well as
17 the claims administration, those are the two main costs.

18 And even with -- with that, I would still assert to
19 the Court, that -- even assuming were the Court to grant fee of
20 one-third, which we will argue for --

21 THE COURT: Yes.

22 MR. FRANCIS: -- it still is a settlement that is more
23 than adequate and fair for this --

24 THE COURT: Well, let's -- let's set -- I mean, well,
25 let's assume, well, one-third of one million seven -- seven

1 ninety is, what, about 300,000 plus, \$350,000.00.

2 Now, do you have an estimate of costs -- legal costs?

3 MR. FRANCIS: In terms of the legal costs, ah, I -- I
4 don't, obviously, we would -- we would have to see -- ah --
5 sitting here today, I don't have that, that's something that --

6 THE COURT: More or less than twenty-five thousand?

7 MR. FRANCIS: Oh, we would think, much less than
8 twenty-five thousand.

9 THE COURT: Okay.

10 MR. RAETHER: And your -- your Honor, we had a quote
11 from the Administrator --

12 THE COURT: That's where I am going next --

13 MR. RAETHER: -- well --

14 MR. FRANCIS: Well --

15 THE COURT: -- the legal costs I am talking about are
16 counsel's costs --

17 MR. RAETHER: Yes.

18 THE COURT: -- for filings.

19 MR. FRANCIS: That's what I understood, your Honor --

20 THE COURT: That's it, okay.

21 MR. FRANCIS: -- that's what I understood.

22 It's certainly well, I would estimate, well less than
23 twenty-five thousand.

24 THE COURT: Okay.

25 MR. FRANCIS: Okay.

1 And the biggest --

2 THE COURT: I'm going to put down \$10,000.00.

3 MR. FRANCIS: -- ah, the biggest cost would be the --

4 THE COURT: You had depositions?

5 MR. FRANCIS: -- mediation.

6 We did not have depositions.

7 THE COURT: Oh, well, you had mediation, too, no, this
8 is --

9 MR. FRANCIS: But --

10 THE COURT: -- I'm surprised that it -- I'm surprised
11 if it's under \$20,000.00.

12 MR. FRANCIS: I think, it will be around the
13 \$20,000.00 range with all the firms.

14 THE COURT: Okay.

15 Now, administrative costs, they're -- counsel said,
16 that is -- you have assessed what the administrative costs are
17 likely to be?

18 MR. FRANCIS: Yes.

19 THE COURT: And let me have those numbers.

20 MR. FRANCIS: Yes, your Honor.

21 We -- as we normally do -- we solicited bids from
22 three class-action administrators, because --

23 THE COURT: Yes.

24 MR. FRANCIS: -- we wanted to make sure that we
25 competitively vet this process and we don't just hand the number

1 to the highest figure.

2 We asked three companies to provide bids, one was
3 American Legal Claim Services, one was, Dahl Administrators and
4 the other one was RSM. We selected -- or have proposed to be
5 the selected administrator ALCS, because they came in much
6 cheaper and they do good work and they were, by \$10,000.00
7 cheaper than the low -- than the second one.

8 And I have an estimate for the Court, if it would like
9 it.

10 THE COURT: Yes, what -- what is that?

11 MR. FRANCIS: It's about twenty-nine thousand.

12 THE COURT: Okay, okay.

13 So, we have around \$400,000.00, then there's -- in the
14 request, are there any other costs, well, there's the -- there's
15 the fee for each of the claimants, which is requested at ten
16 thousand dollars for each of the plaintiffs?

17 MR. FRANCIS: Correct, your Honor.

18 THE COURT: Were they deposed?

19 MR. FRANCIS: Ah, they were not deposed.

20 THE COURT: What did they do, other than meet with
21 counsel and allow the punitive class action to be brought in
22 their names --

23 MR. FRANCIS: Well --

24 THE COURT: -- or is that it?

25 MR. FRANCIS: -- your Honor, they were -- they were

1 available at all times, they helped us answer the discovery
2 requests --

3 THE COURT: Okay.

4 MR. FRANCIS: -- made themselves available for that.
5 They came in to the offices of CLS. They were available for
6 deposition at any time. And they are -- they've given their
7 full cooperation to this -- this proceeding.

8 THE COURT: Okay.

9 So, there's four -- roughly, 420,000.00 -- and then
10 the agreement -- as I recall -- provides that any taxes are
11 going to be -- have to be paid by the recipients, all kinds of
12 taxes as the agreement states --

13 MR. FRANCIS: Well --

14 THE COURT: -- and I have no idea of what amount is
15 going to be, is there any assessment, what taxes are we talking
16 about and how much --

17 MR. FRANCIS: Ah --

18 THE COURT: -- is that likely to be?

19 MR. FRANCIS: -- I -- I don't have that figure for the
20 Court right now, what all of the taxes would be. I -- I don't
21 anticipate it being sizable, but you know, I think, it depends
22 on --

23 THE COURT: Well --

24 MR. FRANCIS: -- yeah, individual amounts.

25 THE COURT: So, we have one idea what those taxes are

1 likely --

2 MR. FRANCIS: Well, I -- it's obviously, everybody's
3 tax burden is somewhat different --

4 THE COURT: Right.

5 MR. FRANCIS: -- let -- may I consult with my co-
6 counsel one second?

7 THE COURT: Absolutely -- absolutely, sure.

8 (Discussion held off the record at 11:36 a.m.)

9 MR. FRANCIS: So, your Honor, as I -- as I thought, so
10 that the -- the taxes would be individualized, because for
11 anybody receiving less than \$600.00, they would not be 1099'd,
12 but over \$600,00, so the expungement class, that's really where
13 you would -- you would see the taxes.

14 Since it's not an employment case, there would not be
15 Social Security taken out of it --

16 THE COURT: Right.

17 MR. FRANCIS: -- but so, we're talking about the
18 hundred and thirty people, who would get an amount in excess of
19 \$600.00 and then, that would be individualized, it's not to
20 them.

21 THE COURT: Okay.

22 So, so far I'm at \$420,000.00 on counsel fees, legal
23 costs, administrative costs and the \$10,000.00 fee for each of
24 the plaintiffs, I'm at \$420,000.00. That leaves us about --
25 what -- six hundred thousand, plus for distribution. Okay.

1 Now, is there going to be any allocation of the costs
2 to the classes or is -- or are the costs, simply going to be
3 taken from the top, you know, taken -- taken from total amount
4 that's put up, so that, in essence, every individual claimant is
5 going to bear the same amount of costs, including people --
6 well, both classes -- certainly both classes, all three classes
7 would absorb the same amount of costs. So, is there any comment
8 you'd have with respect to that?

9 MR. FRANCIS: Yes, your Honor.

10 The answer is that is correct, part of the reason for
11 that is, it's difficult in terms of setting up a website and
12 some of those costs are difficult to divide. Obviously, postage
13 could be -- could be assessed.

14 But much -- we've tried to keep the costs down by
15 using e-mail notice for people for whom their e-mail -- e-mail
16 is available. And what we know is they are about eighty percent
17 of the class that has e-mails available.

18 So, some people are going to get e-mails, some people
19 are going to get followup postage, so it's really hard to do
20 that on a per person or per a class basis.

21 THE COURT: Okay. I understand that.

22 Now, let me go to the next question and that is, how
23 are you going to allocate this \$600,000.00, how are you going to
24 arrive at what each person in the two classes are going to get
25 out of this \$600,000.00?

1 MR. FRANCIS: Because, your Honor, what it
2 contemplates is that the -- the cost -- the settlement
3 administrative costs would come off the top --

4 THE COURT: That's right.

5 MR. FRANCIS: -- okay.

6 THE COURT: We -- we did that, it's six hundred
7 thousand, approximately, that's left for distribution.

8 MR. FRANCIS: No, that includes fees, the six hundred
9 thousand left includes the attorneys' fees.

10 I was saying, that the -- the settlement administrator
11 expenses, the -- the twenty-nine thousand.

12 THE COURT: Oh, yes, okay, okay.

13 MR. FRANCIS: So, that comes off the top --

14 THE COURT: Okay.

15 MR. FRANCIS: -- and then, the fee would be assessed,
16 the attorney fee would be assessed at whatever the percentage
17 the Court were to allow, again, we've --

18 THE COURT: Right, okay.

19 MR. FRANCIS: -- petition up for a third --

20 THE COURT: Right, okay. Right.

21 MR. FRANCIS: -- everybody would pay a third.

22 THE COURT: Okay. All right.

23 MR. FRANCIS: So, for example, somebody getting two
24 hundred dollars for the source claim, if the Court were to
25 approve a third fee, they would get two hundred dollars minus a

1 third.

2 THE COURT: Right.

3 MR. FRANCIS: And somebody getting eleven hundred
4 dollars in the expungement class, eleven hundred dollars minus a
5 third --

6 THE COURT: Right.

7 MR. FRANCIS: -- or minus whatever the Court were to
8 approve.

9 THE COURT: Right. All right.
10 Let me just take a look at my notes.

11 (Pause at 11:39 a.m.)

12 THE COURT: Okay.

13 I am going to take about a ten-minute recess, I want
14 to go through some other notes, I have which may -- I want to
15 take a look, again, at the release a little more carefully.

16 But let me give you -- you know -- let me allow you to
17 finish your presentation, then we'll take that recess. Then, I
18 may come back with more questions.

19 MR. FRANCIS: Thank you, your Honor.

20 THE COURT: Okay.

21 MR. FRANCIS: Just a couple of additional points.

22 Regarding class certification, we outlined why the
23 claims are certifiable under Rule 23. I can go through that of
24 each element right now or --

25 THE COURT: No, I think you've made a full

1 presentation of that in your submissions.

2 MR. FRANCIS: The only thing that I would add to that
3 is that, regarding the adequacy of counsel and I think this,
4 hopefully, should provide the Court with some additional
5 information regarding the arm's length nature of this
6 settlement.

7 In addition to what we've submitted regarding the
8 adequacy of the funds, I and my firm just obtained a -- the
9 largest FCRA class action verdict within the last month, a sixty
10 million dollar verdict against Transunion. And I don't say that
11 to brag, but I say it to show the Court, that we are not a firm
12 that somebody is going to wave some money and we'd just settle
13 cases.

14 We're -- we're the only ones who have tried FCRA cases
15 to a verdicts like that. And if there is this case we thought,
16 it should have been tried for the amount that was offered, I'd
17 be happy to try it.

18 THE COURT: Hm-hmm.

19 MR. FRANCIS: The other thing that I would mention for
20 the Court, is that as the Court may have recalled, Mr. Jenkins
21 had had an individual claim that was not a --

22 THE COURT: Yes, I do recall that --

23 MR. FRANCIS: -- not a --

24 THE COURT: -- what happens to that claim?

25 MR. FRANCIS: So, that claim is in the process or --

1 of being settled or it has been settled, be -- as a -- in
2 connection with Rule 23 and our -- our obligation to disclose
3 that to the Court --

4 THE COURT: Yes.

5 MR. FRANCIS: -- when that's finalized, we are going
6 to present the Court with a stipulation to dismiss that claim
7 from the Jenkins case. And also to demonstrate that it's not
8 tied in any way -- his individual claim -- is not tied to the
9 class relief or his support of the settlement --

10 THE COURT: Yes.

11 MR. FRANCIS: -- they're independent, they're not
12 conditional and we worked very hard to make sure that that
13 stayed out.

14 THE COURT: Right.

15 MR. FRANCIS: But -- but those are only additional
16 points that I would have made.

17 THE COURT: Thank you.

18 We'll take a five or ten-minute recess and I'll be
19 back. Okay.

20 MR. FRANCIS: Thank you, your Honor.

21 DEPUTY CLERK: All rise.

22 (Brief recess is held at 11:42 a.m.)

23 (Resumed in open court at 12:04 p.m.)

24 THE COURT: Defense counsel, you may come forward.

25 MR. RAETHER: Good afternoon, your Honor.

1 THE COURT: Good afternoon, Counsel.

2 MR. RAETHER: Thank you for indulging a California
3 attorney to be able to practice in your court.

4 THE COURT: Our pleasure to have you here.

5 MR. RAETHER: I appreciate it.

6 I am not going to spend a lot of time today, other
7 than to let you know that Realpage is in support of this
8 settlement.

9 If it wasn't clear from Mr. Francis's presentation, it
10 was obviously, a contentious matter. Over the two years that
11 we've litigated this case, we've had many opportunities of
12 disagreement with respect to the three claims that are being
13 settled here.

14 I am not going to go through all three of them and
15 explain how our position diverged from Mr. Francis and why we
16 thought we had a likelihood of success with respect to each of
17 those three claims.

18 But I do want to point out for your Honor with respect
19 to 1681(g) (a) (2) claim, that's the failure to disclose the
20 source, your Honor will recall that we did file a motion to
21 dismiss based on the decision out of the U.S. Supreme Court in
22 Spokeo.

23 The Fourth Circuit more recently has reached a
24 decision in a matter filed by Drayer against Experience
25 Solutions, Inc. and in that -- and in that opinion, your Honor,

1 the Fourth Circuit did find that Experience's failure to
2 disclose the source, was not the type of concrete harm that
3 created an Article III standing. So, if this case had not
4 settled, your Honor, we would have presented Drayer, a Fourth
5 Circuit opinion to the Court for further consideration.

6 I think, importantly -- and Mr. Francis did mention
7 that all of his claims were based on the need for a finding of
8 willfulness.

9 And under Safco, there's two important prongs to that,
10 one is whether the provision is ambiguous and if so, is there
11 any controlling authority? What the Supreme Court said in Safco
12 with respect to controlling authority is that:

13 That would be limited to opinions out of the
14 Circuit Court of Appeals, the Supreme Court or the
15 regulatory agency, who is given the authority to
16 oversee that particular statutory provision.

17 Given that the Fourth Circuit is the only court that
18 has spoken on the application of Article III standing with
19 respect to a 1681(g) (a) (2) claim, we felt that that argument was
20 strong, not -- with respect to the permits of my client's
21 position with respect to what it reported, but also with respect
22 the willfulness prong to the plaintiffs' claim.

23 So, I have -- obviously -- a disagreement with respect
24 to what transpired in terms of the expungement class as well as
25 the chart class. I'm happy to provide any further detail or

1 answer any questions your Honor has about those claims or about
2 the Drayer opinion.

3 THE COURT: No, I -- I do recognize that the issues in
4 this case have -- have been up to this point, hotly contested
5 and would remain hotly contested.

6 And certainly, with respect to the Third Circuit, this
7 is the type of issue that could very well go up to the Third
8 Circuit and you -- and being taken up there by either side,
9 depending on what the District Court did.

10 So, I do recognize the fact that this was hotly
11 contested litigation and I also acknowledge the fact that this
12 settlement is a settlement, it's not an unconditional surrender
13 from the defendant and it's a settlement that has resulted from
14 hard negotiations and a long mediation path. So, I am satisfied
15 in that regard, thank you, Counselor.

16 MR. RAETHER: Okay. Thank you for your time, your
17 Honor.

18 THE COURT: Okay.

19 Now, here -- here is where I am.

20 I am satisfied that based on the submissions and on
21 today's hearing, that preliminary approval of the settlement and
22 a direction to give notice to the class, is appropriate under
23 all of the circumstances.

24 There are two reservations that I have, one, we had
25 some conversation about -- in chambers -- and that is, what the

1 notice should say with respect to what claims are actually being
2 released within the context of this settlement -- this
3 settlement proposal.

4 And, therefore, the parties will be submitting to me,
5 a notice that -- that addresses that reservation that I have.
6 And so, from the standpoint of what the notice should be and
7 what the notice should say, you know, we'll revisit that when we
8 receive an amended submission regarding the notice to the class.

9 The other reservation I have is the allocation of
10 \$10,000.00 to each of the plaintiffs and the question in my mind
11 is, whether or not that's excessive. And I -- I measure that,
12 not only on the basis of what they have done, which was,
13 essential and important for all of the members of the punitive
14 class, but I also measure that within the context of what the
15 class members on an individual basis might be getting by way of
16 a distribution, of course, it certainly wouldn't be anywhere
17 near \$10,000.00.

18 So, I do have some reservation about that and I'd
19 suggest that, you know, I will approve a settlement. I will,
20 preliminarily approve the settlement that contains a payment to
21 each of the class -- each of the plaintiffs -- in an amount up
22 to \$10,000.00. And then, I will make that determination as we
23 get down closer to the -- or at the time that we -- we consider
24 final approval.

25 Any problem with the mechanics that I've stated with

1 respect to the notice and with respect the amount paid to Helen
2 Stokes and James Jenkins?

3 MR. RAETHER: No, your Honor.

4 In fact, you -- you preempted what I was going to
5 suggest, which was that, preliminary approval doesn't mean this
6 Court agrees that ten thousand --

7 THE COURT: Right.

8 MR. RAETHER: -- dollars is appropriate.

9 THE COURT: Right.

10 MR. RAETHER: But we would like the right to be able
11 to try to persuade your Honor --

12 THE COURT: Absolutely.

13 MR. RAETHER: -- at the final-approval stage and,
14 maybe, bring the plaintiffs and --

15 THE COURT: Sure.

16 MR. RAETHER: -- and document what they did and their
17 participation and if the Court is not satisfied, the Court has
18 the discretion to award less than ten thousand.

19 THE COURT: Fine, okay.

20 MR. FRANCIS: Anything, Mr. Francis?

21 MR. FRANCIS: No, your Honor.

22 THE COURT: Okay.

23 Thank you -- well done, Counsel -- thank you for
24 coming in.

25 And we'll issue an appropriate order, okay.

1 MR. RAETHER: Thank you, your Honor.

2 THE COURT: Okay.

3 DEPUTY CLERK: Court is adjourned.

4 (Adjourned in this matter at 12:11 a.m.)

5 * * *

C E R T I F I C A T E

I do hereby certify that the foregoing is a correct transcript of the electronic-sound recording of the proceeding in the above-entitled matter.

Gail Drummond
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Date: September 11, 2017